

Stakeholder Meeting on the Surface Water Protection Program Draft Rule

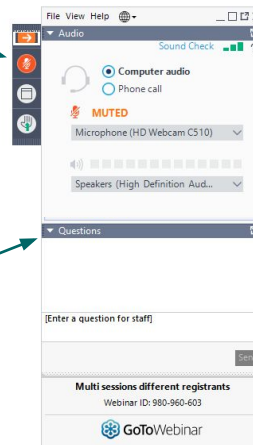
7/18/2022



Erin Jordan

Online Tools

- Muted
- Not Recording Today
- Use the Question Tool



Erin Jordan

- Good afternoon and welcome.
- I'm Dr Erin Jordan of the Surface Water Quality Improvement Team
- Before we get started, we have some housekeeping to do.
 - First, please stay muted while in this meeting. We are asking that you use the question tool for the Q&A portion of this meeting.
 - We are NOT recording this meeting.
- Introductions
 - Justin Bern, the VSM of the Surface Water Quality Protection Team ,
 - Our Program Manager Dr. David Lelsz ,
 - Jonathan Quinsey who is the Legal Specialist with the Surface Water Quality Improvement Value Stream and has taken a critical role in this rulemaking.

Agenda



- SWPP Overview
- Participating in ADEQ's Rulemaking Process
- Upcoming Opportunities to Comment
- Q and A

Erin Jordan

- Go through Agenda
- Pass off to Jonathan



1. What is included in the new SWPP rules?
2. How does ADEQ envision this program working?

Jonathan Quinsey

1. The first portion of the presentation today is broken down into a number of small segments and designed to give an overview of the functional regulatory changes that ADEQ is proposing to make in the SWPP rulemaking. Specifically, ADEQ will address the modifications made to Chapter 11, Article 1, the adoption of the brand new Chapter 11, Article 2, and the draft of the Protected Surface Waters List. In general, what stakeholders should expect to see in the informal draft rules is a regulatory program that meets the requirements of HB2691 to establish a state level program with Arizona specific water quality standards that doesn't come along with excessive administrative changes or new permitting process to learn as ADEQ deploys the SWPP. I've said this at every stakeholder meeting, what ADEQ is delivering is a state level program that provides consistency and clarity to our permittees on how Arizona waters are protected and insulates their permits from the tiresome "in or out" saga of the Clean Water Act. This program give ADEQ the ability to preserve the portions of the Clean Water Act that actually protect Arizona's water resources and provide a predictable regulatory framework for businesses to thrive in the state regardless of what happens at the Federal

1. level.
2. The second portion of the SWPP overview speculates on the impact of the SWPP in the near term future. It's important for stakeholders to note that the legislation written to enable this program was written to fill a regulatory gap that no longer exists. During this rulemaking process, the reach of the SWPP was changed dramatically. When the NWPR was repealed, the scope of the initial adoption of the SWPP shrank. Additionally, the analysis that ADEQ performed to determine the line between the federal waters and state waters had to change. Luckily, ADEQ was able to redirect a number of the award winning tools that we developed to make jurisdictional determinations under the NWPR to suit a significant nexus analysis. ADEQ's ability to quickly adapt our analysis is likely going to be important once again in the near future. One of things we're going to talk about today is the regulatory tools that the agency has given itself to provide consistent and clear environmental protection in the future where more change to WOTUS looks inevitable.

Article 1 Changes



- Appendix A
Realignment
- Appendix B
non-WOTUS
- Definitions



Jonathan Quinsey

- ADEQ's informal draft rule contains minor modifications to the Federal portion of the program that ADEQ feels are necessary to ensure that our Federal program works seamlessly alongside the new state program. ADEQ is modifying the Article one in the general ways that you see on this slide.
- The first thing I want to spend time talking about is the modifications that ADEQ is proposing to make to Appendix B. ADEQ has invested considerable resources in making jurisdictional determinations during this rulemaking because, quite simply, we must. For a water to be protected under our state program ADEQ must make a determination that the water isn't protected under our federal program.
- Our work products beyond this functional rulemaking include producing a significant nexus technical paper that outlines the process and types of data ADEQ has used to make jurisdictional evaluations in this rulemaking, developing a brand new internal WOTUS database that aggregates all the data ADEQ has gathered that can be used for jurisdictional evaluations, partnering

- with Tetra Tech to develop additional guidance regarding the jurisdictional evaluations for significant nexus that will serve as guidelines for stakeholders that want to participate in the jurisdictional evaluation process, and producing around 70 non-WOTUS reports that have been published to our website alongside the draft rules. Each one of these non-WOTUS reports have been reviewed by the EPA. I want to be clear, EPA has taken no affirmative action to agree with the non-WOTUS reports ADEQ has published. They have simply responded to some non-WOTUS reports with a “no comment” designation. After the SWPP rulemaking is complete all Appendix B changes, which includes removing nonWOTUS waters, will be submitted to the EPA for final approval.
- Some less exciting changes that ADEQ is making revolve around our definitions. ADEQ has modified the definitions section of our rules so that they are aligned with the new statutory changes.
- ADEQ is also working to straighten out our numeric water quality standards in Appendix A. I have a slide to discuss these changes next.



- Update on 2019 TR status.
- ADEQ's approach moving forward.

Jonathan Quinsey

- Regarding changes to Appendix A, I'm going to spend a little bit of time speaking general about the process ADEQ is using in the SWPP rulemaking and the future to address mistakes that were made in the 2019 TR. For a larger discussion on this topic from the agency I'm going to suggest reading our Standards White Paper. While this section may seem out of place in the context of adopting a state program, ADEQ believes that our numeric water quality standards are the backbone of the regulatory programs we use to protect surface waters. These standards are developed by reviewing the actual impact a pollutant will have on the designated use of a water body. Simply put, we must get these right. ADEQ is investing significant resources in developing water quality standards that reflect the actual conditions we see in waterways in the state and protect the uses that we've assigned to those waterways.
- On 12/21/2021 ADEQ formally requested a withdrawal of the numeric health and safety standards that were established during our 2019 triennial review. Specifically, ADEQ withdrew the individual pollutant parameters established in A.A.C. Title 18, Chapter 11, Article 1, Appendix A, Table 1 for the domestic

- water source, fish consumption, full body contact, and partial body contact from review.
- These standards were never implemented into our permits, so nothing on the ground is functionally changing.
- To expand on what was written in the standards paper, ADEQ had gone through an extensive review process with the EPA and it was determined that many of these standards were not approvable due to incorrect assumptions made by ADEQ during development. The agency is committed to resolving these issues before submitting revised standards to the EPA. EPA has approved ADEQ's withdrawal of those standards and if you want more information, once again we ask that you please refer to our standards white paper.
- To address the disparity between the rules that are published in the Arizona Administrative Code and those that are actually effective, ADEQ is modifying our rules to reflect the standards that have been approved by the EPA and are currently effective in the SWPP rulemaking. This is because ADEQ intends to adopt extremely similar numerical standards for our state protected waters.
- On the other side of this, ADEQ is reiterating some other standards from the 2019 TR that have not yet been approved by the EPA. Specifically the individual pollutant parameters for Aquatic and Wildlife and Agricultural uses. EPA has communicated to ADEQ that Fish and Wildlife is still doing an Endangered Species Act (ESA) analysis on those changes. EPA originally had expected that review to be finished sometime in the summer but they haven't been firm on the timeline. They have not completed their review and the deadline keeps getting pushed back. ADEQ must complete the SWPP rulemaking by the end of the year so we're proceeding along the most scientifically viable path that we have to ensure that our standards are actually protective. ADEQ's actions in this regard will help insulate permittees who take out AZPDES permits from any potential ESA liability when discharging to either a WOTUS or non-WOTUS protected surface water.
- The most recent EPA communications has been that they expect the following parameters that ADEQ adopted during the 2019 TR that are associated with the Aquatic and Wildlife uses to be approved by the end of the year. Those standards are:
 - Pesticides
 - Acrolein
 - Cadmium
- For Ammonia, there is still work to do. EPA may have indicated that our ammonia standards for the Aquatic and Wildlife warm water and EDW uses are not currently approvable. Our standards for the cold water use are approvable.
- ADEQ is working with EPA to maintain the standards that we set for Ammonia

- during the 2019 TR. The EPA has commented that our numbers are based on a recalculation procedure (not 304(a)) and ADEQ hasn't provided adequate justification. Although conversations are ongoing and a specific error has not been identified by EPA like they did for our human health and safety standards, ADEQ believes that using local species to calculate these standards was correct. We're currently working with the EPA to ensure that we're calculating standards that protect species that actually live in the waters these standards protect. The agency will continue to follow up with stakeholders regarding standards throughout the rulemaking process.

Article 2 Overview



- Arizona's SWPP Standards
- The Protected Surface Waters List
- Best Management Practices

Jonathan Quinsey

- Arizona SWPP is adopted in the brand new Article. Stakeholders and permittees will see many familiar provisions in Article 2, and ADEQ is specifically looking for comments on the water quality standards we've adopted for the state program. I'm going to quickly summarize the changes that were made and then talk about a few of the rules in depth.
 - Definitions have been adopted to adequately describe the terms in the article and match the SWPP enabling language
 - The applicability section specifically adopts limiting language from the statute. Additionally, ADEQ has developed certain statements of intent on the reach of Article 2 in R18-11-210 to limit any confusion about the reach of the new rules.
 - ADEQ has adopted similar designated uses to the Federal program. The new designated uses are as follows:
 - Aquatic and Wildlife Cold AZ
 - Aquatic and Wildlife Warm AZ

- Full Body Contact AZ
- Partial Body Contact AZ
- Drinking Water Source AZ
- Fish Consumption AZ
- Agricultural Irrigation AZ
- Agricultural Livestock Watering AZ
- ADEQ has replaced the tributary rule with a new presumptive, designated uses rule in R18-11-204. We believe this is an extremely important change and I'll talk about this more on the next slide.
- ADEQ has maintained regulatory guardrails that require our sampling to go through approved methodology to ensure that our sampling procedures produce verifiable results. ADEQ has also established regulatory guardrails for adding or removing waters protected by the SWPP. I'm going to talk a lot about these guardrails today because they will allow stakeholders plenty of room for comment in any future SWPP rulemaking.
- ADEQ has established provisions that allow us to be flexible with permits. Specifically, R18-11-206 allows ADEQ to establish mixing zones, R18-11-207 allows us to modify permits as a result of natural background pollutants, R18-11-208 allows the agency to set compliance schedules.
- R18-11-209 allows the agency to enforce our water quality standard on non-permitted discharges.
- ESE Economic, Social, and Environmental cost/benefit procedures are set in R18-11-211. I have a slide coming up on this where I'll talk more.
- R18-11-212 establishes state specific narrative standards
 - ADEQ has not included narrative/numeric standards for biocriteria or bottom deposits in this early draft of the SWPP. Currently, there are not state protected surface waters that meet the "perennial, wadable" definition that these standards apply to for federal protected waters. Given the limitations of the statute, ADEQ cannot justifying adopting standards that don't actually apply to any of the listed waters. This may change during the course of rulemaking as waters get added/removed from the PSWL.
- R18-11-213 is numeric standards. I spoke at length about the adoption

- of these in the last slide.
- R18-11-214 is the protected surface waters list. I'll speak about this more later on in the presentation.
 - PSWL
 - Non-wotus
 - Wotus
- R18-11-215 is our BMPS.
 - BMPs

Regulatory Levers - Highlights



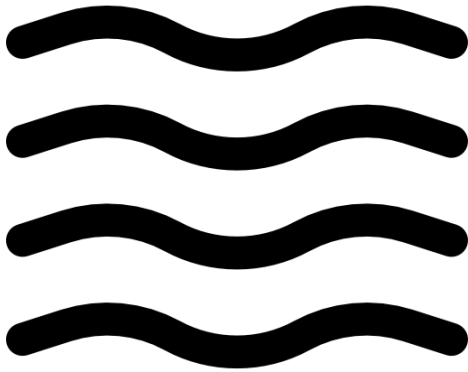
- Emergency PSWL Additions
- Potential change to WOTUS

Jonathan Quinsey

- One of the things that ADEQ has been most cognizant of when drafting these rules is to draft a set of regulations that could be used if the definition of WOTUS changes again in the near future.
 - ADEQ is proceeding with the expectation that there will be additional WOTUS changes in the next year. We want to make sure that we're as prepared as we can be to react to jurisdictional changes. The original SWPP legislation included gap filling measures that will expire when the first rulemaking is complete and we're doing our best to give ourselves opportunity to provide the continuity and clarity that I keep talking about to stakeholders and permittees through a couple of the rules we're adopting.
 - In our federal program, the tributary rule covers waters that are discovered to be WOTUS but don't have Appendix B standards associated with. The idea is sound, ADEQ does not have perfect knowledge of every waterway in the entire state and we need a way to

- assign uses to waters so that we can protect them. However, ADEQ has heard numerous stakeholder complaints throughout the years about the level of uncertainty this creates as to which waters are regulated. We hear you, and we've spent a lot of time considering the type of rule ADEQ would adopt that's similar in this SWPP program.
- One of the major limitations towards establishing a lever like the trib rule is that the SWPP enabling legislation explicitly states that for a water to be protected, it must be listed on the PSWL. The only time this is not the case is when the director discovers an imminent or substantial threat to public health or the environment may occur if a surface water isn't listed. In the unlikely event that this happens, ADEQ has established a new rule in Article two to assign designated uses to that water so the agency can actually protect it.

The Protected Surface Waters List



- How the list is constructed
- Protected waters
- Ongoing process

Jonathan Quinsey

- The protected surface waters list, or PSWL, is likely to be the most scrutinized portion of this rulemaking. All in all, this list contains 37 non-WOTUS waters that will ADEQ is proposing to protect using the new standards adopted in Article 2. As a reminder to stakeholders, the PSWL does not contain ephemeral waterways as those are prohibited from being protected under the SWPP.
- ADEQ's ESE analysis considered three categories of waters for protection under this program - Sky Island Streams, Isolated Lakes, and Ecologically, Culturally, or Historically Significant Waters. Our ESE analysis showed the benefits of protecting two of those categories, Sky Island Streams and Isolated Lakes, outweighed the costs.
- Sky Islands streams are surface waters that flow in isolated mountain ranges in southeastern Arizona. Some of the mountains rise more than 9,000 feet above the surrounding desert floor making the lowlands and high peaks drastically different environments. These mountains contain a number of perennial or

- intermittent surface waters that may have no significant nexus to a traditionally navigable water as the water generally infiltrates or evaporates in the deserts surrounding the sky island. In the mountains, these streams provide valuable habitat, recreational opportunities, and some may hold a level of cultural significance. Some examples of these types of waters are Pinery Creek and Big Creek.
- Isolated Lakes are an important hydrological resource in Arizona that also provide valuable habitat, recreational opportunities, and are frequently used by Arizonans for fishing. These lakes can be located in the wildland or urban environments. Some examples of these waters on the PSWL are Morman Lake and Stoneman Lake. We've called them isolated lakes because ADEQ's analysis has revealed that these non-WOTUS waters don't have a significant nexus to other hydrological features covered by the Clean Water Act.
- It's important to note that the informal, draft PSWL is not final. ADEQ is still processing waters, and we will continue to do so until the day before we file the NFRM. We hope you take the time to review our non-WOTUS reports and engage with the scientific process that ADEQ is using to make these determinations. Simply put, there's a lot of data to review and the agency is humming along making these decisions as fast as practicable.
- The informal draft preamble contains a list of waters that ADEQ is still analyzing for inclusion in either the state program. ADEQ has included this list to help set expectations early on in this process. If anyone has information that they feel is relevant to the waters listed, please reach out to ADEQ and provide it to us.
- The protected surface waters list also contains a list of WOTUS protected surface waters in Arizona. This list is similar to Appendix B, but also includes surface waters that ADEQ has extended federal protections to under the tributary rule in Article 1. Similar to the non-WOTUS waters, if stakeholders have information on any waters that ADEQ is considering WOTUS, please reach out to us.
- The end of this presentation contains a lot of information about how to submit additional waters and the type of information we're looking for.



- ESE procedure adopted in rule
- ADEQ has provided regulatory guardrails for future action

Jonathan Quinsey

- ADEQ's ESE procedures adopted in R18-2-211 ensure consistency in establishing any future SWPP regulations. We would like stakeholders to view the procedure laid out in the informal draft rule as an additional effort from ADEQ to provide regulatory guardrails on future SWPP actions. The agency believes that the process we've used for this rulemaking is ripe to be replicated. We've taken the valuable lessons from our process and made them requirements for future rulemaking.
- The rule is intended to function similarly to the EIS requirement that all Arizona agencies are required to submit along with a rulemaking. I like to think of it as a super-EIS. ADEQ's ESE rule requires that the agency perform an analysis that is truly specific to Arizona when valuing waters and listing them.
- Specifically, the requirements of this rule will apply when:
 - Adopting a water quality standard that applies to non-WOTUS protected surface waters at a particular level or for a particular water category of non-WOTUS protected surface waters;

- Adding a non-WOTUS protected surface water to the Protected Surface Waters List when the conditions of A.R.S. § 49-221(G)(4) apply. We call these may add waters.; or
 - Removing a non-WOTUS protected surface water from the Protected Surface Waters List when the conditions of A.R.S. § 49-221(G)(6) apply. We call these may remove waters.
- Generally, the rule mandates an extremely public process that will allow stakeholders to review the valuation methodology that ADEQ uses in rulemaking. This will allows the public to ensure that ADEQ is using the Arizona specific information required by the statute when performing any of the actions that I just mentioned.

Participating in the Rulemaking Process



- PSWL White Paper Submission Directions
- Commenting on WQS

Jonathan Quinsey

If you've been getting our communications, you probably have noted that ADEQ is still accepting submissions for waters that could potentially be listed on the Final PSWL. The Final PSWL is the version of the list that will be codified in the Arizona Administrative Code to meet the HB2691 requirement that "[n]ot later than December 31, 2022, the Department shall adopt by rule the protected surface waters list[1].". ADEQ is continuing to both add and remove waters as appropriate from the Initial PSWL during the development of the Final PSWL. This process may continue after publication of the NPRM until the agency publishes the NFRM. If you view the version of the preamble that was listed alongside the draft rules, you'll notice that ADEQ has also provided a list of waters that are still under consideration. The agency is doing its best to set expectations about waters that are getting analyzed. If you have any information about these waters please reach out to the agency.

I also want to mention that there are severe limitations to the changes that ADEQ will make during this rulemaking to Article 1, Appendix B. Remember, all modifications made to that article need to be approved by the EPA. ADEQ has developed a process alongside our Federal partners to make sure that they have the necessary time to

review and provide comment on any of our non-WOTUS determinations if they so choose. We do not intend on surprising EPA with last second non-WOTUS determinations. The issues with the standards from 2019 as well as the necessity of delisting Appendix B waters so that they can be listed on the PSWL make the expedient EPA approval of the modifications in this rulemaking an absolutely necessity.

We look forward to getting actionable data from stakeholders on waters of concern. I'm going to use the next few slides to talk about what actionable data looks like. Throughout this process, ADEQ has received requests from stakeholders to list waters that have little to no information about the water associated with submission. Sometimes these waters aren't even listed on our GIS maps. ADEQ has also developed a process for stakeholders to submit nominations for waters to be added or removed from the PSWL during the SWPP rulemaking, including the required documentation to support the listing or delisting of waters. All nominations for waters must be submitted to PSWL@azdeq.gov. To be evaluated for the Final PSWL, non-WOTUS waters must meet one of the following criteria and include some of the listed evidence for ADEQ to make a final assessment during the rulemaking process:



Public waters only
Evidence of
recreational use

Jonathan Quinsey

- Waters to be Evaluated Because They are Used for Recreation:
 - Evidence that the water is a public water.
 - Public Waters is defined by HB2691 as “waters of the state open to or managed for use by members of the general public.”
 - Evidence that the water signed, posted, and publicized as a recreation area.
 - Signed confirmation by a city, county, federal, or other governmental figure that can attest to the water bodies use.
 - Evidence/location of official documentation that can confirm the water body is used for recreation.
 - Specific information on the types of uses. Swimming, wading, boating, etc.



- Public Waters
- Evidence that they are used for fish consumption

Jonathan Quinsey

- **Waters to be Evaluated Because They are Used for Fish Consumption:**

Evidence that the water is a public water.

- In person creel surveys of anglers.
- Stocking data, including size and species of fish.
- Intergovernmental agreements that illustrate a body of water is stocked for fish consumption.
- Information on whether maintaining a population of fish sufficient for consumption is viable in the specific water body.
- Watershed plans.
- Publicized evidence that the area is used for fishing.

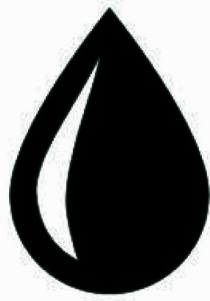
Drinking Waters



- Name of drinking water system
- Water source
- Municipal clearance if applicable

Jonathan Quinsey

- **Waters to be Evaluated Because They are Perennial and Intermittent Waters of the State Used as a Drinking Source:**
 - Name of public water system
 - Source of water for that system
 - Confirmation from the owner of the Drinking Water System
 - Confirmation from municipalities
 - Location data for surface water inlets



Adjacent
wetlands
Perennial
waterways



Jonathan Quinsey

- **Waters to be Evaluated Because They are Perennial and Intermittent Wetlands Adjacent to PSWLs**
 - Inundation data, whether it lies in a floodplain or 100-year floodplain
 - FEMA maps
 - Location data
 - National Wetland
 - Vegetation, species that are present on the Army Corps of Engineers National Wetland Plant List; obligate or facultative wetland species

Upcoming Opportunities



- NPRM to be filed in August. Official comment period begins.
- Stakeholder meetings throughout the comment period.
- Final hearing.

Jonathan Quinsey

- Please provide comments by 7/26.
- Reach out to the agency, we're happy to meet to discuss portions of our rules.



Q and A

Erin Jordan

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Erin Jordan